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 and J. Hernandez*

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

ANDRE KENNETH STUCKEY,

Plaintiff,

v.

**CALIFORNIA DEPARTMENT OF
 CORRECTIONS AND
 REHABILITATION, et al.,**

Defendants.

4:20-cv-05886-YGR

**DEFENDANTS' OPPOSITION TO
 PLAINTIFF'S MOTION FOR LEAVE TO
 FILE SUR-REPLY**

Judge: The Honorable
 Yvonne Gonzalez Rogers

Trial Date: Not set.
 Action Filed: August 21, 2020

INTRODUCTION

The Court should deny Plaintiff Stuckey's motion for leave to file a sur-reply because his filing is procedurally improper, late, and seeks to introduce supplemental argument. Stuckey moved for leave to file an authorized sur-reply (ECF No. 36) to submit new evidence concerning his assertion that he qualifies for the imminent-danger exception to the three strikes rule. Procedurally, Stuckey failed to comply with Civil Local Rule 7-3(d), because his submission was untimely—filed more than more than seven days after the reply was filed—and does not oppose

1 reply evidence or highlight any subsequent published decision. Civ. L.R. 7-3(d). Moreover, the
 2 evidence submitted, specifically Dr. Allen’s declaration, does not demonstrate Stuckey was in
 3 imminent danger of serious physical injury. To the contrary, Dr. Allen has never seen Stuckey,
 4 admittedly declares he lacks information to make a definitive determination regarding Stuckey’s
 5 claims, and states “In all fairness, the institution may have everything in place to achieve
 6 adequate protection to Mr. Stuckey.” (Pl.’s Req. for Leave, 7-9, ECF No. 36.) Accordingly, the
 7 Court should deny Stuckey’s motion.

8 **RELEVANT PROCEDURAL HISTORY**

9 Defendants filed a motion to revoke Stuckey’s *in forma pauperis* status, request for judicial
 10 notice, and proposed order on February 23, 2021. (ECF Nos. 13, 13-1 & 13.2.) Stuckey opposed
 11 the motion, and Defendants replied on May 3, 2021. (ECF Nos. 15 & 18.) On May 19, 2021,
 12 Stuckey filed a sur-reply which he entitled “Plaintiff’s Opposition to Defendants’ Reply in
 13 Support of Motion to Revoke Plaintiff Stuckey’s in Forma Pauperis Status.” (ECF No. 34.)
 14 Defendants moved to strike Stuckey’s sur-reply because Stuckey failed to seek leave of Court
 15 before filing his brief and his filing did not otherwise comply with the local rules regarding post-
 16 reply supplemental materials. Civ. L.R. 7-3(d); (ECF No. 35.) Stuckey did not oppose
 17 Defendants’ motion to strike. Before the Court issued it’s ruling on Defendants’ motion to strike,
 18 Stuckey now seeks leave to file another sur-reply. (ECF No. 36.) Defendants oppose Stuckey’s
 19 motion for leave to file an unauthorized sur-reply because it does not comply with the local rules
 20 regarding post-reply supplemental materials and seeks to submit new inadmissible evidence to
 21 establish an exemption to the revocation of his *in forma pauperis* status. *See* Civ. L.R. 7-3(d) and
 22 Prison Litigation Reform Act, 28 U.S.C. § 1915(g).

23 **ARGUMENT**

24 **I. STUCKEY’S REQUEST FOR LEAVE TO FILE SUR-REPLY SHOULD BE DENIED.**

25 Under Civil Local Rule 7-3(d), a party opposing a motion can file no further briefs after the
 26 reply is filed, except to object to new evidence submitted in the moving parties’ reply. Stuckey
 27 offers no objections concerning evidence submitted in Defendants’ reply brief. (See ECF No.
 28 18.) Instead, Stuckey repeats the same arguments raised in his opposition and attempts to put

1 additional evidence before the Court which is speculative and unrelated to the fact that Stuckey
 2 cannot demonstrate he was in imminent danger of serious physical injury. (ECF No. 36.)
 3 Stuckey cannot escape that fact that there is no evidence of Stuckey testing positive for COVID-
 4 19. (See Defs.’ Reply, 3, ECF 18.) Because the Local Rules do not permit this supplemental
 5 evidence, the Court should deny Stuckey’s motion for leave.

6 Moreover, the Court should also deny Stuckey’s request for leave because it is untimely.
 7 Stuckey was required to file his objections no later than May 10, 2021. Stuckey’s original sur-
 8 reply was not filed until May 19, 2021. (ECF No. 34.)

9 Because Stuckey’s motion is procedurally defective and untimely, the Court should deny
 10 his motion.

11 **II. THE EVIDENCE ATTACHED TO THE SUR-REPLY DOES NOT ESTABLISH AN IMMINENT** 12 **DANGER EXCEPTION.**

13 In addition to largely repeating the same arguments raised in his opposition, Stuckey’s
 14 request for leave alleges that the evidence attached to his sur-reply—Dr. Allen’s declaration—
 15 shows he was in imminent danger of serious physical harm when he filed his original complaint
 16 because Defendants exposed him to COVID-19 on numerous occasions related to “ordering
 17 mandatory COVID-19 testing and contact tracing of its staff and inmates.” (ECF No. 36 at 1.)
 18 Stuckey cannot demonstrate he was in imminent danger of serious physical injury because
 19 Stuckey has never offered any evidence of testing positive for COVID-19. (See Defs.’ Reply, 3,
 20 ECF 18.)

21 Stuckey also misstates Dr. Allen’s as supportive on Stuckey’s claims of being in imminent
 22 danger. (ECF No. 36.) Instead, Dr. Allen admits that he lacks information to make a definitive
 23 determination regarding Stuckey’s claims. (*Id.* at 7.) Dr. Allen also noted, “In all fairness, the
 24 institution may have everything in place to achieve adequate protection of Mr. Stuckey.” (*Id.* at
 25 9.) Stuckey’s claims are not plausible because they are based on conclusory and unsubstantiated
 26 statements that correctional Defendants exposed him to COVID-19. Absent conclusive evidence
 27 of testing positive to COVID-19, Stuckey’s continuous claims of being in the “high risk category
 28 for severe to fatal outcome if infected” (ECF No. 36 at 3, 7) is too speculative and simply does

not meet the burden of proving that he satisfies the exception to 28 U.S.C. section 1915(g). Accordingly, Stuckey's sur-reply violated Local Rule 7-3(d) and his request for leave should be denied.

CONCLUSION

Stuckey's motion for leave should be denied because it is procedurally defective, late, and seeks to introduce additional evidence in opposition to Defendants' motion to revoke his in forma pauperis status. Moreover, Dr. Allen's declaration does not demonstrate Stuckey was in imminent danger of serious physical injury. Therefore, Defendants request the Court deny Stuckey's motion.

Dated: June 15, 2021

Respectfully submitted,

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/s/ **Virginia I. Papan**
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CERTIFICATE OF SERVICE

Case Name: ***Stuckey, Andre Kenneth***
(AK1711) v. CDCR, et al.

No. **4:20-cv-05886-YGR**

I hereby certify that on June 15, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE
SUR-REPLY**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On June 15, 2021, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Andre Kenneth Stuckey (AK1711)
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532-7500
In Pro Se

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 15, 2021, at San Francisco, California.

N. Codling
Declarant

/s/ N. Codling
Signature